

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: June 29, 2007

TO : Rochelle Kentov, Regional Director  
Region 12

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Gimrock Construction Co.  
Case 12-CA-20473

133-0100  
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This Bill Johnson's<sup>1/</sup> BE & K<sup>2</sup> case was resubmitted for advice as to whether the Region should issue a complaint alleging that the Employer violated Section 8(a)(1) and (4) of the Act by filing and maintaining a Section 303 lawsuit seeking damages for the Union's alleged jurisdictional strike, despite the Board's finding, which has now been enforced, that the strike was a lawful economic strike.

We conclude that the charge should be dismissed, absent withdrawal. The Employer's lawsuit was reasonably based, and there is no evidence that the Employer filed its suit solely to impose litigation costs on the Union regardless of the outcome of the case. We further conclude that the lawsuit was not filed for an "illegal object" under footnote 5 of Bill Johnson's.

### Background and Basic Facts

The Union and Employer had been parties to a series of Section 8(f) project agreements until 1995. In March 1995, the Union was certified to represent a unit of the Employer's equipment operators, oiler/drivers, and mechanics. During subsequent negotiations, there was a dispute over the Employer's non-represented employees performing work within the unit description. On May 31, 1995, the Union struck because of the Employer's asserted refusal to include oiler/drivers in the bargaining unit.

The Region issued a complaint in January 1996, alleging that the strike became an unfair labor practice

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<sup>1</sup> Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

<sup>2</sup> BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002).

strike and that the Employer unlawfully refused to reinstate the strikers upon their unconditional offer to return to work. The ALJ issued a decision on May 31, 1996, finding that while the strike was an economic strike instead of an unfair labor practice strike, the Employer had unlawfully failed and refused to reinstate the former strikers. In so finding, the ALJ rejected the Employer's defense that the employees were not entitled to reinstatement because they had allegedly engaged in an unlawful Section 8(b)(4)(D) jurisdictional strike in order to force the Employer to assign certain work to Union-represented employees.<sup>3</sup>

The Board affirmed the ALJ's findings and order.<sup>4</sup> However, in footnote 1 of its decision, the Board found merit to the Union's exceptions to the ALJ's characterization of the Union-Employer dispute "as being about whether certain work would be performed by the union's members or by 'non-bargaining unit' or 'non-union' employees." The Union characterized the dispute as "simply that any employee (union or nonunion) performing oiler or mechanic's work should be covered by the contract and paid contractual wages and benefits, in accordance with the bargaining unit certification." The Board found merit to the exception, stating that in adopting the ALJ's conclusions, "we do not rely on these statements by the judge."<sup>5</sup>

On March 10, 1999, the General Counsel moved the Board to clarify its reinstatement order. The Employer opposed that motion and cross-moved that the Board omit footnote 1, described above. By order of July 27, 1999, the Board granted the General Counsel's motion and denied the Employer's cross-motion as an untimely motion for reconsideration.

Meanwhile, on May 28, 1999, the Employer filed a Section 303 (29 U.S.C. § 187) suit against the Union in the U.S. District Court for the Southern District of Florida, seeking damages as a result of the Union's allegedly illegal jurisdictional strike. The court heard arguments

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<sup>3</sup> The ALJ rejected that defense based on his view that since the Employer had not filed a Section 8(b)(4)(D) charge, and therefore since there had been no Section 10(k) hearing and award of work, there could be no 8(b)(4)(D) violation; hence, he concluded that the strike was not unlawful under that section.

<sup>4</sup> Gimrock Construction, Inc., 326 NLRB 401 (2005).

<sup>5</sup> Id. at n. 1.

on a Union motion to dismiss or for summary judgment, as well as an Employer motion for summary judgment, in January 2000.

On January 21, 2000, the Board applied to the Eleventh Circuit for enforcement of its order. The Employer opposed enforcement on the theory that the employees were not entitled to reinstatement because they had engaged in an unlawful jurisdictional strike. The Board's brief, filed in June 2000, asserted that it had reasonably rejected the Employer's defense that the strike had an unlawful jurisdictional object.

On May 16, 2000, before any district court ruling on the motion to dismiss or any motions for summary judgment, the Employer moved to stay the Section 303 proceedings, on the ground that the Eleventh Circuit, in the enforcement action, would likely decide the merits of whether the strike was unlawful. The Union did not object to that motion, and on July 6, 2000, the district court granted the motion to stay, requiring the parties to notify the court within 10 days of the Eleventh Circuit's decision.

The Region previously submitted this case to Advice, recommending that it issue complaint alleging that the Employer's Section 303 lawsuit was baseless and retaliatory under Bill Johnson's and was unlawful under footnote 5. At that time, we concluded that the Region should hold the charge in abeyance pending the Eleventh Circuit's decision.<sup>6</sup>

On April 20, 2001, the Eleventh Circuit temporarily denied enforcement of the Board's order requiring reinstatement of the strikers.<sup>7</sup> It found that the Board had summarily rejected the ALJ's characterization of the Union's bargaining position, noted that both parties' positions were plausible and supported by some evidence in the record, and directed the Board to explain its contrary conclusion that the Union's bargaining position did not evidence a jurisdictional objective.<sup>8</sup>

On remand, the Board concluded, consistent with its original decision, that the evidence failed to establish that the Union's bargaining position reflected an unlawful

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<sup>6</sup> See Gimrock Construction Co., Case 12-CA-20473, Advice Memorandum dated July 28, 2000.

<sup>7</sup> NLRB v. Gimrock Constr., Inc., 247 F.3d 1307 (11<sup>th</sup> Cir. 2001).

<sup>8</sup> Id. at 1312.

jurisdictional objective, and that the Union did not engage in an unlawful jurisdictional strike.<sup>9</sup> The Eleventh Circuit enforced the Board's order, finding, among other things, that substantial evidence supports the Board's finding that the Union's bargaining position did not evidence an unlawful jurisdictional dispute.<sup>10</sup>

On January 26, 2007, the Union filed a status report advising the district court of the Eleventh Circuit's enforcement decision and asking it to rule on its earlier motions for dismissal and summary judgment. On March 8, the district court issued an "Order as to Proposed Dismissal of Action," providing the Employer a final opportunity to file an opposition to the dismissal or to demonstrate that any issues remained pending. The Employer did not respond to the Order, and on March 27, the district court dismissed the Section 303 lawsuit.

#### ACTION

We conclude that the charge should be dismissed, absent withdrawal. The Employer's lawsuit was reasonably based, and there is no evidence that the Employer filed its suit solely to impose litigation costs on the Union regardless of the outcome of the case. We further conclude that the lawsuit was not filed for an "illegal object" under footnote 5 of Bill Johnson's.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded civil lawsuit to have constituted an unfair labor practice.<sup>11</sup> Previously, in Bill Johnson's Restaurants, the Court had articulated two standards for evaluating lawsuits, one for ongoing suits and one for concluded suits.<sup>12</sup> For ongoing lawsuits, the Bill Johnson's Court held that the Board may halt the prosecution of the suit if it lacks a reasonable basis in fact or law and was brought for a retaliatory motive.<sup>13</sup> For concluded suits, the Court held that if the litigation resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise

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<sup>9</sup> 344 NLRB No. 128 (2005).

<sup>10</sup> NLRB v. Gimrock Constr., Inc., 2006 WL 379069 (11<sup>th</sup> Cir. Dec. 27, 2006) (mem.).

<sup>11</sup> BE & K, 536 U.S. at 527.

<sup>12</sup> 461 U.S. at 747-749.

<sup>13</sup> Id. at 748-749.

shown to be without merit, the Board could find a violation if the suit was filed with a retaliatory motive.<sup>14</sup> Thus, even if a concluded suit had been reasonably based, the Board could find an unfair labor practice if the suit was unsuccessful and retaliatory.

In BE & K, which involved a completed lawsuit, the Court rejected the standard set out in Bill Johnson's for resolving reasonably based but unsuccessful lawsuits. The Court held that this previous standard was overly broad because it would condemn some lawsuits that were the result of genuine petitioning protected by the First Amendment, though they were ultimately unsuccessful.<sup>15</sup> Thus the Board may no longer rely on the fact that a lawsuit was ultimately meritless, but must determine whether the suit was reasonably based.<sup>16</sup>

The BE & K Court also considered the Board's standard that a retaliatory motive could be found in reasonably based suits if the lawsuit itself attacked protected conduct.<sup>17</sup> The Court held that this standard would condemn genuine petitioning where a lawsuit was directed at conduct that a plaintiff reasonably believed was unprotected.<sup>18</sup> The Court also reasoned that inferring a retaliatory motive from evidence of animus would condemn genuine petitioning in circumstances where the plaintiff's "*purpose is to stop conduct he reasonably believes is illegal.*"<sup>19</sup> The Court left open whether some other showing of retaliatory motive could suffice to condemn a reasonably based but unsuccessful suit. It intimated that a reasonably based suit might be condemned as retaliatory if it would not have been filed but for a motive to impose upon the defendant the costs of the litigation process, regardless of its outcome, in retaliation for protected activity.<sup>20</sup>

As the Court in BE & K did not re-articulate the standard for determining whether a lawsuit is baseless, the

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<sup>14</sup> Id. at 747, 749.

<sup>15</sup> 536 U.S. at 532.

<sup>16</sup> Id. at 532-537.

<sup>17</sup> Id. at 533.

<sup>18</sup> Id.

<sup>19</sup> Id. at 534 (emphasis in original).

<sup>20</sup> Id. at 536-537.

standard set forth in Bill Johnson's remains authoritative. In Bill Johnson's, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.<sup>21</sup> Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."<sup>22</sup> Thus, a lawsuit can be deemed baseless only if it is unsupported by facts or is premised on unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

We conclude that the Employer's Section 303 lawsuit seeking damages for the Union's allegedly jurisdictional strike was reasonably based in fact and law. Although the Eleventh Circuit ultimately enforced the Board's finding that the Union's bargaining position did not evidence an unlawful jurisdictional dispute, it first temporarily denied enforcement of the Board's decision until the Board explained its reason for rejecting the ALJ's characterization of the Union's bargaining position.<sup>23</sup> Specifically, the Eleventh Circuit found that the Board had not set forth the evidence supporting its decision or explained why this evidence outweighed the conflicting evidence. It described the matter as a "close case," noting that "both parties' positions are plausible" and that each position was supported by, and undermined by, the evidence in the record.<sup>24</sup> In light of these findings, it cannot be argued that the lawsuit is "unsupported by facts." The Board's decision on remand further supports the conclusion that the Employer's arguments in the Section 303 lawsuit cannot be deemed baseless. The Board acknowledged that certain of the Union's proposals or statements were, or might be considered, ambiguous as to the question of jurisdictional objective.<sup>25</sup> Thus the

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<sup>21</sup> 461 U.S. at 744-746. See also Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 963 (2000).

<sup>22</sup> 461 U.S. at 746-747.

<sup>23</sup> Gimrock, 247 F.3d at 1312.

<sup>24</sup> Id.

<sup>25</sup> Id., slip op. at 6, 7. The Board ultimately concluded that these arguably ambiguous proposals and statements, when properly examined in the overall context of the Union's certification and the parties' negotiations, did

lawsuit was clearly supported by some facts and cannot be said to be baseless as a matter of fact.

We next consider whether in the Section 303 lawsuit the Employer would necessarily be precluded from attacking the Board's determination that the strike was lawful, such that the lawsuit was baseless as a matter of law. In appropriate circumstances, a prior factual determination by the Board on the legality of a strike can be *res judicata* on the issue of liability in a Section 303 suit for damages.<sup>26</sup> Whether the Board's findings should be given preclusive effect in any given case, however, depends on various factors, including whether: (1) the Board conducted a full hearing on the same issues; (2) the present parties were represented by counsel, and were accorded full opportunity to argue their positions, to present evidence, and to call, examine and cross-examine witnesses, (3) the parties used such opportunity and fully litigated the issues involved; (4) the Board's determination was supported by sufficient evidence on the record as a whole; and (5) the determination made of the issue in the prior action was necessary and essential to the resulting judgment.<sup>27</sup>

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not support a finding that the Union had engaged in an unlawful jurisdictional strike. Id., slip op. at pp. 7-9.

<sup>26</sup> The distinction between *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) has become blurred. "Res judicata" is now commonly used to incorporate both *true res judicata* and collateral estoppel. See, e.g., Intl. Union of Operating Engineers v. Sullivan Transfer, 650 F.2d 669, 676 (5<sup>th</sup> Cir. 1981). Accordingly, we use the term *res judicata* here in the broader sense. However, collateral estoppel is technically the relevant analysis here. That doctrine provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue. United States v. Stauffer Chemical Co., 464 U.S. 165 (1984).

<sup>27</sup> See, e.g., Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081, 1084 (5<sup>th</sup> Cir. 1969); IAM v. Nix, 512 F.2d 125, 132 (5<sup>th</sup> Cir. 1975); H.L. Robertson & Assoc. v. Plumbers Local Union No. 519, 429 F.2d 520, 521 (5<sup>th</sup> Cir. 1970). See generally International Wire v. Local 38, IBEW, 357 F.Supp. 1018 (N. D. Ohio, 1972), enfd. 475 F.2d 1078 (6<sup>th</sup> Cir. 1973).

Given that the application of collateral estoppel is not automatic but depends on a court's findings with respect to a number of factors, we must evaluate the reasonableness of the Employer's claims that collateral estoppel should not apply to the Board's findings. In its cross-motion for summary judgment, the Employer argued that the Board's footnote 1 comments on the Union's motivation for the strike are unsupported by substantial evidence, and therefore that collateral estoppel does not apply. The Employer argued, among other things, that inasmuch as the Board relied on the same facts as the ALJ and did not dispute his credibility findings, the Board's contrary comments in footnote 1, as a matter of law, are unsupported by substantial evidence.<sup>28</sup> The Employer also made this argument to the Eleventh Circuit on enforcement in Gimrock. The Court did not reject the argument out-of-hand, but rather gave it serious consideration.<sup>29</sup> In this situation, we cannot say that this Employer argument was frivolous.

The Employer also argued that the Board's comments in footnote 1 have no preclusive effect because they are not essential to the Board's decision. According to the Employer, it was not the ALJ's resolution of the factual issues that resulted in the ALJ's conclusion that the strike was not illegal, but rather his reliance on the statutory limitations on the Board's authority to find a violation of Section 8(b)(4)(D) regardless of the facts. The Board agreed and adopted the ALJ's reasoning. Therefore, according to the Employer, since the Board accepted the ALJ's procedural rationale for rejecting the Employer's affirmative defense, the Board's comments on the merits of the ALJ's factual findings regarding the nature of the parties' bargaining demands were *dicta* and can have no collateral estoppel effect. We conclude that this was a

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We note that the Employer's lawsuit was brought in the District Court for the Southern District of Florida. Although the court is now in the Eleventh Circuit, it was originally part of the Fifth Circuit, and Fifth Circuit decisions prior to the October 31, 1981 split are considered binding precedent in the Eleventh Circuit.

<sup>28</sup> The Employer relied on Mosher Steel Co. v. NLRB, 568 F.2d 436, 441 (5th Cir. 1978) ("if the Board relies on the same facts as the trial examiner and does not dispute credibility findings, substantial evidence does not exist to support a contrary finding.").

<sup>29</sup> Gimrock, 247 F.3d at 1310-1311.



non-frivolous argument at the time it was made, in light of the Board's first decision, where it stated that in adopting the judge's conclusions as to the alleged unfair labor practices, it did not "rely on" the judge's statements concerning the Union's motive. Arguably, the Board merely adopted the ALJ's procedural rationale for rejecting the Employer's affirmative defense.

In light of these non-frivolous arguments that collateral estoppel should not apply to the Board's findings, we cannot say that the lawsuit was baseless as a matter of law.

We further conclude that there is insufficient evidence to demonstrate that the Employer had the kind of retaliatory motive that might render a reasonably based suit unlawful. There is no evidence that the Employer would not have filed the lawsuit but for a motive to impose the costs of the litigation process, regardless of its outcome, in retaliation for protected activity.

Nor do we find that the lawsuit had an "illegal object" within the meaning of footnote 5 of Bill Johnson's.<sup>30</sup> We realize that an argument could be made that the Employer's lawsuit falls within the illegal objective exception to Bill Johnson's because it was aimed at achieving a result that would have been incompatible with the Board's ruling on the legality of the strike.<sup>31</sup> However, this argument is arguably inapplicable in a Section 303 context. In ILWU v. Juneau Spruce, the Supreme Court held that court proceedings under Section 303 are "independent" of Section 8(b)(4) ULP proceedings in the sense that a Board decision is not a prerequisite to the institution of a Section 303 suit.<sup>32</sup> The Court observed that the NRLA specifies two different remedies before two different tribunals for the respective violations, and that each tribunal is entitled to make its own independent decision on the evidence before it. Although, as discussed

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<sup>30</sup> Bill Johnson's, 461 U.S. at 737 n. 5.

<sup>31</sup> See, e.g., Teamsters Local 776 (Rite Aid), 305 NLRB 832, 835 (1991) (union violated the Act by seeking judicial enforcement of an arbitration award that was in direct conflict with the Board's unit clarification determination; lawsuit aimed at achieving a result that is "incompatible" with the Board's ruling falls within the "illegal objective" exception to Bill Johnson's), enfd. 973 F.2d 230 (3rd Cir. 1992), cert. denied 507 U.S. 959 (1993).

<sup>32</sup> 342 U.S. 237, 244 (1952).

above, collateral estoppel may apply under the appropriate circumstances, the statutory structure allows for the separate actions to lead to inconsistent results.<sup>33</sup> In light of the statutory structure, as interpreted by the courts, that allows for parallel and even inconsistent proceedings, we cannot say that the Employer had an illegal objective within the meaning of Rite Aid. We also note that although the Employer filed the lawsuit after the Board decision had issued, the Employer later voluntarily stayed the 303 proceeding pending the Eleventh Circuit's ruling on enforcement. And after the Eleventh Circuit issued its decision enforcing the Board's order, the Employer took no further action in support of its suit.

### Conclusion

In these circumstances, we conclude that the Employer did not violate the Act by filing and maintaining the lawsuit. Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

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<sup>33</sup> See, e.g., NLRB v. Deena Artware, 198 F.2d 637 (6<sup>th</sup> Cir. 1952) (Sixth Circuit, on the same day, reached inconsistent decisions in § 303 and § 8(b)(4) actions). In Edgewood Contracting, 416 F.2d at 1084-1085, the Fifth Circuit held that Deena Artware was not contrary to its conclusion that res judicata could apply to the Board's findings of fact. The court noted that the issue in Deena, whether at the appellate level it should set aside findings made by two finders of fact because inconsistent, is a different problem from whether the courts lack power to prevent relitigation of the same issue in the first instance. Id.